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Supreme Court

of the

United States

SPRING TERM, 1973

NO. 73-271

RAUL JESUS ALVAREZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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MIAMI REVIEW — 371-4853 — 377-3721

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RAUL JESUS ALVAREZ,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on April 9, 1973.

CITATIONS TO OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals is printed in Appendix A hereto and is reported at 476 F.2d 280 (5th Cir. April 9, 1973)

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 9, 1973. Rehearing was denied on May 17, 1973. The jurisdiction of this Court is invoked under Title 28. United States Code, Section 1254 (1). This Petition is not timely.[1]

QUESTIONS PRESENTED

1. Whether there is sufficient evidence in this record to connect the Defendant with eleven (11) pounds of heroin and six (6) pounds of cocaine and thus justify its introduction against him when weighed against the devastatingly prejudicial impact of such evidence when placed before a petit jury.

2. Whether there is sufficient evidence to convict the Defendant of a conspiracy to possess and distribute narcotics where there is no evidence that he accomplished or furthered any of the aims of the conspiracy.

3. Whether in light of the "hardly conclusive" evidence of Defendant's guilt, the trial court committed fundamental error in permitting its law clerk to read instructions to the jury.

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[1]Counsel for Petitioner misconceived the due date of this Petition. Counsel moved for an extension of time in which to file this Petition for Certiorari, but due to his error in computing time the motion was returned by the Clerk. The untimeliness of this Petition is through no fault of the Petitioner himself.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provision involved is the due process clause of the Fifth Amendment to the United States Constitution, U.S.C.A. Const. Amend. V.

STATEMENT OF THE CASE

After a jury trial, Defendant was convicted of one count of conspiracy to possess with intent to distribute and to distribute narcotic drugs in violation of 21 United States Code §846. Defendant was sentenced to five (5) years imprisonment pursuant to 18 United States Code § 4208 (a) (2) to be following by three (3) years probation.

FACTS

In light of the fact that the Government presented no testimony upon which the conviction could be based, the Defendant rested his case immediately after the trial court denied his motion for directed verdict at the close of the Government's case.

The Government's case consisted entirely of the testimony of three witnesses, a confidential informer and two Government agents, and two boxes containing eleven pounds of heroin and six pounds of cocaine. Only one of the Government witnesses, Manuel Rodriguez (the confidential informer) had any dealings whatsoever with the Defendant. The two agents merely observed Rodriguez' three encounters with the Defendant from a distance.

Rodriguez told of meeting with the Defendant three times. The first meeting took place on December 14, 1971 at a Royal Castle hamburger stand in Miami. Rodriguez' testimony was given through an interpreter and the de-

scription of the Royal Castle meeting is so vague and confusing that it must be set out verbatim:

Q. Would you please state to us the circumstances surrounding this meeting?

A. December 14 around one o'clock I arrived in one car with Rene Vandenadez. Rene look for Chu Chu (the Defendant) and in one car and both pull the car into the Hamburger Castle place on 67th and 8th Street.

Q. Is that a Royal Castle, sir?

A. Hamburger place, Royal Castle, hamburger. Royal Castle there, the name over there. So, Rene said to Chu Chu — that is the only name I know him — to Chu Chu where are you? I looking for two or three days and Chu Chu say, "You see the bald man?" I don't know who is the bald man. I don't see nobody.

Q. When you speak of "him" to whom are you referring?

A. Rene asked Chu Chu is he had seen the bald man. Chu Chu said that he hadn't seen anybody.

. . .

Chu Chu told Rene that he had not seen anybody because he was hot and that he had nothing at the garage because Calito (phonetic) was at the beach. They didn't want to go to the garage because Rene was very hot and to go at five o'clock to the beach. To the beach is the place he knew.

. . .

Q. Who was going to the beach?
A. Rene.

Q. Who told Rene to go to the beach?
A. Chu Chu.

. . .

> Rene answered that he was going to the beach for sure and then one person that was in the car with Chu Chu who was waiting there, got out of the car. It is better for you to terminate that conversation because the brown car has been by two or three times and you are going to have some problems. Chu Chu said to them be at the beach for sure at five o'clock and Rene said okay. Rene speeded his car. He gave me $5.00 to go to a movie and he ordered me to come back to the Pueblo Supermarket at seven p.m.

Thus ended the first direct encounter between Rodriguez and the Defendant. The second meeting took place that evening at the Pueblo Supermarket. Once again Rodriguez testified that the Defendant told him "that his connections were very scared because Rene was very hot and he could lose everything.[2] The only other thing Defendant did at this meeting was talk with Rene Vandena-

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[2]Later in his testimony the Government Attorney brought Rodriguez back to this conversation. This time Rodriguez testified:

> A. On a specific day he told me the connection was very careful of Rene and didn't want to give Rene anything; that these people didn't want to lose four or five kilos because it was a lot of money. I was angry and I wanted to return to Chicago right away.

dez out of Rodriguez' hearing. The only other thing the Defendant said at this meeting was that Rodriguez should rent a car and wait for the Defendant to pick him up in the morning to go to Chicago.

Rodriguez waited at the Orange Motel until two o'clock the next day. The Defendant did not show up. Rodriguez then left the Motel and proceeded to the gas station owned by Rene Vandenadez. Rene told Rodriguez that he would try to reach the Defendant and that Rodriguez was to wait at the Pueblo Supermarket at seven p.m.

At seven p.m. that night Rodriguez met with the Defendant for the last time. Once again the Defendant told him that he was unable to get "something" from the connection "because he was very afraid that Rene was very hot on account of his kidnapping; and that they were not going to lose."

According to Rodriguez, the Defendant then told him to wait for Rene and tell him to meet the Defendant at nine o'clock the next morning "to see the connection, both of them together, and to try to convince him to give him the thing." Rodriguez conveyed the message.

However, the Defendant never showed up "to see the connection." Instead, it was Rene Vandenadez and his wife who, according to Rodriguez, had seen the connection.

From this point on, the Defendant took no part whatsoever in the events described by Rodriguez and the two Government agents. Counsel for the Defendant objected to the admission of any further conversations between Rodriguez and co-conspirators or between co-conspirators out of the presence of the accused.

Rodriguez then told of another meeting at the Pueblo Supermarket on December 16 to which no one came.

The next day Rodriguez and special agent Saul Weinstein of BNDD left Miami for Chicago.

Between December 17, 1971 and January 5 or 6, 1972 nothing happened.

On January 5 or 6, 1972, Rodriguez, together with agents Weinstein and Schular of BNDD returned to Miami after Rodriguez had received a telephone message from Rene Vandenadez.

Immediately upon his arrival in Miami, Rodriguez proceeded to Rene Vandenadez' garage. From this point on, he was under constant surveillance by agents Weinstein and Schular. Apparently, Rodriguez' arrival was too late to meet a man from New York who Rene had intended that he meet. Rodriguez asked Rene "what do I have to do with New York?", to which Rene responded "I changed my plans" and proceeded to describe new plans which involved, according to Rodriguez, the delivery of one package in New York and one package in Chicago.

Once again, counsel for the Defendant objected on the grounds that absolutely no connection was shown between the Defendant and the two deliveries in New York and Chicago. The Court ruled that the conversations were admissable to show "course of conduct", but subsequently limited the admission of the conversations subject to "direct connection with the Defendant." When counsel for the Government continued to inquire of Rodriguez regarding the New York plans, the Court overruled Defendant's repeated objection.

Rodriguez then testified that he and Rene talked about having a "contact" and that Rene told him that as soon as he contacted "the person" he would set up a meeting at the Pueblo Supermarket.

The only mention of the Defendant came when the Government asked Rodriguez "Did [Rene] tell you anything else that evening?", to which Rodriguez answered "That he had to locate Chu Chu" and that Chu Chu would take care of him in Chicago.

On January 6, 1972, Rodriguez, Rene Vandenadez and Marta Rodriguez picked up two boxes at a Texaco Station one of which was placed in Rodriguez' car and the other in an Oldsmobile belonging to Rene Vandenadez. Thereafter, one of the boxes was turned over by Rodriguez to the Agents and the other was picked up by the Agents pursuant to a search warrant.

On cross examination Rodriguez testified that to his knowledge the Defendant never talked to him or anyone else about the subject of narcotics; that he never asked the Defendant to supply him with narcotics and that the words narcotics, heroin or cocaine were never used by the Defendant.

The only words used by the Defendant which were interpretable as narcotics related were "connection" and "kilos", about which words it was readily admitted that they have substantial non-narcotics meanings. Rodriguez admitted that he was never told who the "connection" was or the purpose of the "connection".

Rodriguez further admitted on cross examination that the New York transaction was a different transaction

than the one about which he had discussions with Defendant. Moreover, Rodriguez described how Rene Vandenadez told him to meet the Defendant in Chicago in December but that the Defendant never showed up.

The testimony of Agents Weinstein and Schular added very little to the Rodriguez story except to corroborate via surveillance at a distance that the meetings described by Rodriguez did take place and that the packages were acquired as described on January 6, 1972. Defendant's fingerprints were not found on the packages.

At the beginning of the trial, counsel entered into a stipulation that Government's exhibits 1A and 1B were the two boxes taken from Manuel Rodriguez and Rene Vandenadez. Counsel for the Defendant did not, however, stipulate either to the contents of the boxes or to their admission into evidence.

At the end of the Government's case, counsel agreed to and did stipulate that the boxes contained eleven (11) pounds of heroin and six (6) pounds of cocaine but continued to object to the introduction thereof which objection was cut short and overruled.

At the conclusion of all the evidence, the trial judge permitted his law clerk to read the instructions to the jury.

The Petitioner appealed the jury verdict and judgment of guilt presenting to the Court of Appeals the questions now presented here. The Fifth Circuit affirmed the lower court *per curiam* notwithstanding its observation that "the Government's case against Alvarez was hardly conclusive".

REASONS FOR GRANTING THE WRIT

I

THIS CASE PRESENTS AN IMPORTANT QUESTION IN THE ADMINISTRATION OF CRIMINAL JUSTICE AS TO WHAT DEGREE A CONNECTION MUST BE SHOWN BETWEEN A DEFENDANT AND THE SPECIFIC HEROIN AND COCAINE OFFERED AS PROOF AGAINST HIM.

The decision of the Court of Appeals does not deal directly with Petitioner's point that admission of the heroin and cocaine was error but its affirmance of Petitioner's conviction constitutes a negation of the point and is therefore in conflict with the reasoning of the Ninth Circuit in *Evans v. United States*, 257 F.2d 121 (9th Cir.), *cert. denied* 358 U.S. 866 (1958). *Evans*, did not turn on error in the admission of physical evidence. However, the principles enunciated in *Evans* directly control the question of whether a connection need be shown between defendant and specific heroin upon which the Government bases its case. William and Josephine Evans were tried on two counts of unlawfully concealing, transporting and selling heroin, one count of unlawfully concealing and transporting marijuana and one count of conspiracy to commit the offenses with regard to the heroin. The Government's uncontroverted evidence failed to show any connection between Williams and the specific heroin referred to in the substantive counts. This connection lacking, William's conspiracy conviction was reversed.

Likewise, the Government's uncontroverted evidence in the present case failed to show any connection between the Petitioner and the eleven (11) pounds of heroin and six (6) pounds of cocaine placed before the jury. In dealing only with Petitioner's "sufficiency" argument, the Court of Appeals observed,

> Finally, even considering Vandenades' change of plans with regard to the destination of the narcotics, we are not prepared to say that the jury could not "*reasonably conclude*" that Alvarez's negotiations with the connection enabled Vandenades to ultimately obtain the narcotics. (Memorandum opinion at 3) (Emphasis supplied)

It was not for the jury to decide whether a connection had been shown. The admission of physical evidence is a matter within the discretion of the Court in the first instance and it has been recognized such evidence can have a substantial impact on a jury and should be admitted only where completely necessary and relevant. *Cf, Landsdown v. United States*, 348 F.2d 405 (5th Cir. 1965)

Basically, therefore, this case presents an important question in the administration of criminal justice and one which was not expressly dealt with by the Court of Appeals. There are few cases dealing directly with the precise question of connection between defendant and physical narcotics exhibit. In *United States v. Conrad*, 448 F.2d 271 (9th Cir. 1971) and *United States v. Alloco*, 234 F.2d 955 (2d Cir.) *cert. denied*, 352 U.S. 931 (1956) the question was left open because the "connection" was apparent. In *Roviaro v. United States*, 379 F.2d 911 (7th Cir. 1967) strong independent evidence of defendant's guilt overcame the prejudice inhering in the admission of unconnected heroin.

In the instant case, even the Court of Appeals found that "the Government's case against Alvarez was hardly conclusive . . . " and found resort to principals of appellate construction in affirming the jury verdict. This case presents, therefore, an important question as to the degree to which it must be shown that the heroin and cocaine were a product of the conspiracy in which defendant participated before it is placed before a petit jury.

II

THE CONSPIRACY PROSECUTION HAS BECOME A CATCH-ALL LAW ENFORCEMENT TOOL. THE COURT OF APPEALS' AFFIRMANCE OF PETITIONER'S CONVICTION EXTENDS THE ALREADY NET-LIKE SCOPE OF THIS TOOL BY EFFECTIVELY BRINGING WITHIN THE MEANING OF CONSPIRACY THE DEFENDANT WHO DOES NOTHING TO FURTHER ITS AIMS BUT, FOR REASONS OF HIS OWN, IS UNWILLING TO OPENLY REPUDIATE IT. THIS CASE, THEREFORE, PRESENTS A CRUCIAL QUESTION AS TO THE SCOPE OF CONSPIRACY AND THE DEGREE TO WHICH THE JURY WILL BE ALLOWED TO CHOOSE BETWEEN CONFLICTING INFERENCES.

Without belaboring the details set forth in the "Statement of the Case," *infra.*, it is undisputed that the Government's case against Petitioner, in order to succeed, required the jury to reason as follows:

> Although the government failed to show that the defendant accomplished anything for the conspiracy, although the government's own witnesses related how the defendant failed to show up on several occasions to perform acts which would have been in furtherance of the conspiracy; although the eleven (11) pounds of heroin and six (6) pounds of cocaine were acquired by persons other than the defendant, more than three (3) weeks after the last time any of the government's witnesses stated he was even involved and after the disposition plans had been changed apparently without defendant's knowledge, we can conclude that defendant was part of the conspiracy because he himself had told the co-conspirators that he was unable to make the "connection" and, from this we can infer that he tried.

Unmistakably, this case will have a significant impact on the administration of criminal justice by permitting the Government to secure conspiracy convictions on the bare testimony of paid informers who are themselves unable to show any conclusive accomplishment of Defendant in furtherance of the conspiracy. Nevertheless, the jury is permitted to choose its inference and the Defendant goes off to jail not because there is proof that he conspired but because he has failed to prove that he did not. As it stands this case is in conflict with *Ingram v. United States*, 360 U.S. 672 (1959); *Panci v. United States*, 256 F.2d 308 (5th Cir., 1958); *Evans v. United States*, 257 F.2d 121 (4th Cir. 1958); *Ong Way Jong v. United States*, 245 F.2d 392 (9th Cir. 1957) and with *Krolewitch v. United States*, 366 U.S. 140 (1949) (Mr. Justice Jackson concurring)

III

THIS CASE PRESENTS AN IMPORTANT ISSUE OF FIRST IMPRESSION AS TO THE PROPRIETY OF THE TRIAL JUDGE PERMITTING HIS LAW CLERK TO DELIVER THE INSTRUCTIONS TO THE JURY IN A CLOSE CASE OR OTHERWISE.

Rule 30, Federal Rules of Criminal Procedure provides that "the court shall instruct the jury . . . " The interests of justice are best served when the trial judge makes a diligent effort to apply Rule 30 both in letter and in spirit. *Walker v. United States*, 418 F.2d 1116, 1119. (D.C. Cir. 1969). "Great care must be used in instructing a jury in crimes involving serious penalties to insure that those who acted mistakenly or inadvertently or for other innocent reasons are properly protected." *United States v. Brown*, 453 F.2d 101, 108 n. 8, (8th Cir. 1971) *cert. denied* __U.S.__, 92 S.Ct. 1205 (1972). Where the issues are close the trial judge has an obligation to instruct the jury with extreme precision and the appellate court has a duty to review the charge with what, in a less doubtful case, would be an undue meticulousness. *Cooper v. United States*, 357 F.2d 274, 276 (D.C. Cir. 1965).

Judge Choate permitted his law clerk to read the jury instructions. Clearly, the respect which is due to the Judge as the guiding principal of the law does not inure to the Judge's clerk merely because the Judge informs the jury that the Clerk will read the instructions because he cannot.

The Trial Court committed reversible error by permitting its law clerk to deliver the jury charge.

CONCLUSION

Based on the foregoing reason and authority, Petitioner prays this Honorable Court grant his Petition for Writ of Certiorari.

Respectfully submitted,

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BY /s/ Donald I. Bierman
DONALD I. BIERMAN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for Writ of Certiorari was mailed this 31st day of July, 1973 to United States Attorney, 300 Ainsley Building, Miami, Florida 33132 and to the Solicitor General in Washington, D.C.

/s/ Donald I. Bierman

DONALD I. BIERMAN